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Nos. 85-1222 and 85-1267

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, ET AL.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Petitioners contend that the court of appeals erred in holding that the Interstate Commerce Commission (ICC) lacks jurisdiction to exempt from state regulation the motor portion of intrastate trailer-on-flatcar (TOFC) transportation provided by interstate railroads.

1. The Staggers Rail Act of 1980 (Staggers Act), Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, amended the Interstate Commerce Act to preempt state regulation of interstate railroads, even with respect to

shipments that originate and terminate within one state. The Act provided a mechanism, 49 U.S.C. 11501 (b), whereby states wishing to continue to exercise jurisdiction over intrastate transportation provided by a rail carrier could apply to the Commission for "certification" to exercise jurisdiction in accordance with federal standards. Specifically, 49 U.S.C. 11501(b)(2) provides that a state authority may sumbit its regulatory standards and procedures to the Commission, and 49 U.S.C. 11501(b)(3)(A) provides that the Commission shall certify such state authority if the Commission determines that the state standards and procedures are "in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission." If a certified state rejects a proposed intrastate rate or practice of an interstate railroad, the railroad may petition the ICC to reverse the state's decision for failing to follow federal standards. 49 U.S.C. 11501(c). In any state whose authority has not been certified by the Commission, "[a]ny intrastate transportation provided by a[n interstate] rail carrier * * * shall be deemed to be transportation subject to the jurisdiction of the Commission * * *." 49 U.S.C. 11501(b)(4)(B).

2. In 1981, pursuant to its authority to exempt from regulation any service provided by "a rail carrier providing transportation subject to the jurisdiction of [the Commission]," 49 U.S.C. 10505(a), the ICC exempted TOFC traffic from all regulation.[1] The

[1] When goods are to be delivered from or to a place not accessible by rail, TOFC eliminates the need to transfer the goods between rail car and truck. The goods are loaded into a truck trailer that is carried on a flatcar for the rail portion of the journey. See generally *American Trucking Ass'ns* v. *A.T. & S.F. Ry.*, 387 U.S. 397 (1967).

exemption applies to both the rail portion and the motor portion of the movement as long as the truck service is provided by a railroad in its own trucks as part of a continuous intermodal movement. Congress specifically provided in the Staggers Act that "[t]he Commission may exercise its [exemption] authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement," 49 U.S.C. 10505(f), and the Commission concluded that railroad-provided TOFC motor service is "transportation that is provided by a rail carrier" within the meaning of this provision. See *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 391, 396 (1980), aff'd, 364 I.C.C. 731 (1981).

The Fifth Circuit appeared to uphold the Commission's exemption of TOFC traffic in all relevant respects in *American Trucking Ass'ns* v. *ICC (ATA)*, 656 F.2d 1115 (5th Cir. 1981). Petitioners in *ATA* had argued that the TOFC exemption exceeded the Commission's authority because the statute prohibits it from exempting motor carriers from the Act's requirements (with exceptions not relevant here). 49 U.S.C. 10521(b)(1). The court of appeals rejected this challenge (656 F.2d at 1120 (footnote omitted)):

> [R]ail-owned truck TOFC/COFC service is "transportation that is provided by a rail carrier." Had Congress intended to limit the Commission's exemption authority to rail transportation, it could easily have done so by using that language. Instead, it chose the broad "transportation-that-is-provided-by-a-rail-carrier" language and presumably did so with knowledge that it previously had defined "transportation" to include the movement of passengers or property by motor vehicle. 49 U.S.C. § 10102(24).

3. Following the Commission's promulgation of the TOFC exemption, the petitioner railroads filed a petition with the Railroad Commission of Texas (RCT) requesting that the exemption be applied to Texas intrastate traffic. After a hearing, RCT exempted the rail portion of intrastate TOFC movements but declined to apply the exemption to the motor portion even though provided by an interstate railroad. The petitioner railroads thereafter appealed to the ICC. The ICC ordered implementation of the exemption with respect to the entire movement, explaining that ICC exemptions are "federal standards" that are binding on the states.

4. Texas sought review of the ICC orders in the Fifth Circuit. While that petition was pending, the ICC denied Texas' application for permanent certification to regulate intrastate rail rates.[2] Under the statute, this denial rendered "[a]ny intrastate transportation provided by a rail carrier in [Texas] * * * subject to the jurisdiction of the Commission." 49 U.S.C. 11501(b)(4)(B). The government therefore argued to the court of appeals that Texas' petition for review was moot. The court of appeals disagreed and reversed the Commission. The court distinguished between "intrastate rail traffic," over which the ICC concededly has jurisdiction, and "intrastate trucking connected with intrastate rail travel" (Pet. App. 6a). The court held that the Commission lacks jurisdiction

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[2] *Ex parte No. 388 (Sub. No. 31) State Intrastate Rail Rate Authority—Texas*, 1 I.C.C.2d 26 (1984), aff'd *sub nom. Railroad Commission of Texas* v. *United States*, 765 F.2d 221 (D.C. Cir. 1985). Prior to the ICC's decision denying certification in May 1984, Texas had received "provisional" certification. It was pursuant to that provisional certification that RCT issued the decision at issue here.

to regulate intrastate motor carriage and therefore that it may not require Texas to apply the TOFC exemption to the motor portion of intrastate TOFC movements provided by interstate railroads. The court of appeals subsequently denied a petition for rehearing en banc.

5. We agree with petitioners that the court of appeals clearly erred in holding that the ICC lacks jurisdiction to exempt intrastate TOFC traffic in its entirety from regulation. The Staggers Act was designed to free interstate railroads from the constraints of state regulation even with respect to intrastate shipments. See *Illinois Commerce Commission* v. *ICC*, 749 F.2d 875, 886 (D.C. Cir. 1984), cert. denied, No. 84-1829 (Oct. 7, 1985). Indeed, the court of appeals in this case recognized that "[a] principal change occasioned by the Staggers Rail Act was the curtailment of the authority of the states to regulate [intrastate rail] traffic" (Pet. App. 6a). And the court acknowledged that the Commission "has authority 'to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement' " (*ibid.*, quoting 49 U.S.C. 10505(f)). The court's decision therefore rests on its conclusion that the truck portion of intrastate TOFC traffic provided by a railroad is not "transportation that is provided by a rail carrier as a part of a continuous intermodal movement," but instead is "intrastate transportation provided by a motor carrier," which remains subject to state regulation under 49 U.S.C. 10521(b)(1). See Pet. App. 6a-7a.

This conclusion does not withstand analysis. First, it is at odds with the language of the statute. Petitioners are interstate rail carriers, not motor carriers, and therefore the TOFC service they provide is

transportation "provided by a rail carrier," not transportation "provided by a motor carrier." The Commission has specifically ruled that the truck portion of TOFC service is transportation provided by a rail carrier within the meaning of 49 U.S.C. 10505(f), and the Fifth Circuit has affirmed and expressly approved that ruling. *American Trucking Ass'ns* v. *ICC*, *supra*. As the Fifth Circuit reasoned in *ATA*, if Congress had intended to limit its preemption of state regulation solely to rail traffic, it could "easily" have done so explicitly instead of using the broader phrase "transportation provided by a rail carrier." See 656 F.2d at 1120. Since the Fifth Circuit had held in *ATA* that this phrase generally encompasses the truck portion of TOFC traffic, it was illogical for it to hold that "transportation provided by a rail carrier" ceases to include the truck portion of TOFC traffic when the shipment originates and terminates within a single state. The court of appeals provided no explanation for this evident inconsistency.[3]

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[3] The court's statement (Pet. App. 6a) that it would "court potential mischief" to accept the Commission's interpretation because it would allow a "small intrastate railroad" to operate intrastate TOFC traffic that consisted almost exclusively of truck traffic is difficult to understand. Intrastate rail carriers are not within the ICC's jurisdiction at all. See 49 U.S.C. 10501(b)(1); *Magner-O'Hara Scenic Ry.* v. *ICC*, 692 F.2d 441, 444 (6th Cir. 1982). This case involves major interstate railroads, and, in that setting, the Commission's interpretation plainly furthers the policies of the Staggers Act. Under the decision of the court of appeals, two nearly identical TOFC shipments carried on the *same train* will be subject to wholly disparate regulatory schemes because one shipment crosses a state line and one does not. See 85-1267 Pet. 7-8. Thus, the court of appeals' decision reintroduces the very problem of state regulation interfering with interstate rail traffic that the Staggers Act sought to eradicate. See 85-1222 Pet. 11-12.

The court of appeals' decision is also at odds with the rationale of decisions in other circuits. In *Illinois Commerce Commission* v. *ICC*, *supra*, the District of Columbia Circuit held that a state regulating intrastate traffic under certification by the Interstate Commerce Commission is required to apply the same exemptions adopted by the ICC. Given the ICC's recognized authority under 49 U.S.C. 10505(f) to exempt TOFC traffic in its entirety, the District of Columbia Circuit's decision is difficult to square with the conclusion of the court of appeals in this case that the ICC lacks jurisdiction to regulate a portion of intrastate TOFC traffic. See 85-1222 Pet. 17-18; 85-1267 Pet. 4-6. In addition, the Seventh Circuit in *Hansen* v. *Norfolk & Western Ry.*, 689 F.2d 707, 712 (1982), has noted with approval the ICC's ruling that the truck portion of railroad-provided TOFC service is transportation "provided by a rail carrier" within the meaning of 49 U.S.C. 10505(f). However, because no other court of appeals has faced the precise question presented here—whether the truck portion of intrastate TOFC traffic is outside the ICC's jurisdiction—it is arguable that there is not yet a direct conflict in the circuits on this issue.

We are not in a position to assess the practical impact of the court of appeals' erroneous decision. The ICC advises us that the total amount of intrastate TOFC transportation provided by rail carriers is not large at this time but that there is a significant possibility of growth. Given the lack of a direct conflict, the Court could conclude that review would be premature. On the other hand, we believe the court of appeals was clearly wrong, and there is little prospect that its decision will be uniformly adopted by other courts of appeals. The decision therefore in-

jects substantial confusion into the interpretation and administration of the Staggers Act. Moreover, allowing the court of appeals' misreading of the Staggers Act to stand may constrict the future development of one potentially important form of transportation service.[4] On balance, because the court of appeals has clearly erred and because its decision directly hinders the achievement of one of the principal goals of the Staggers Act, we believe that it is appropriate for the Court to grant certiorari.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

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[4] Because of the size of the state of Texas, questions concerning the regulation of intrastate commerce assume more practical importance in the Fifth Circuit than in most other circuits.

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